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United States District Court
 Northern District of California, San Jose Division

VERIGY U.S. INC., a Delaware corporation

Plaintiff,

vs.

ROMI OMAR MAYDER, an individual;
 WESLEY MAYDER, an individual;
 SILICON TEST SYSTEMS INC., a
 California corporation; SILICON TEST
 SOLUTIONS LLC, a California limited
 liability corporation,

Defendants.

Case No. 5:07-cv-04330 (RMW) (HRL)

**Defendants' Objections to Plaintiff's Evidence in
 Support of Reply and Supplemental Brief Re
 Preliminary Injunction**

Submitted Under Seal
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Defendants Romi Mayder, Wesley Mayder, Silicon Test Systems Inc., and Silicon Test Solutions LLC ("Defendants") object to the following evidence submitted by Plaintiffs in support of its Reply and Supplemental Brief re Order to Show Cause re Preliminary Injunction set for hearing on December 14, 2007 before this Court:

A. Declaration of Ira Leventhal in Support of Plaintiff's Reply and Supplemental Brief Re Order to Show Cause Re Preliminary Injunction

Plaintiff relies on testimony by Ira Leventhal to attempt to identify alleged trade secrets and to identify a confidentiality policy. Mr. Leventhal is unqualified to testify as to either of these issues.

OBJECTION NO. 1:

Defendants object to and move to strike the contents of Paragraph 6, beginning at page 3, line 16 and continuing through page 4, line 23, and beginning with:

[REDACTED]

Grounds for Objection:

Mr. Leventhal is not qualified to opine as to the existence of trade secrets. Mr. Leventhal's declaration identifies 24 separate Verigy trade secrets, but he conceded in this deposition that he is not qualified to opine as to the existence of any trade secrets; underscoring Mr. Leventhal's lack of qualifications, he testified that he believes trade secrets can appear in published documents. Indeed, he testified that Verigy discloses "many" of its putative trade secrets *in its patents*!

[REDACTED]

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1 [REDACTED]
2 [REDACTED]

3 Defendants object to the statements contained in paragraph 6 because they constitute opinion
4 testimony, do not satisfy the requirements of the Federal Rules of Evidence ("F.R.E.") Rule 701, and
5 should be excluded.²

6 Defendants further object to the contents of paragraph 6 because it is speculative and should
7 be excluded pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice,
8 confusion or waste of time.)

9 Defendants will respectfully request the court at the hearing on the motion to sustain the
10 above objections and to strike the evidence referred to above.

OBJECTION NO. 2:

11
12
13 Defendants object to and move to strike the contents of Paragraph 4, concerning Verigy's
14 policies concerning protecting the confidentiality of its documents.

Grounds for Objection:

15
16 Under California law, a trade secret must be "the subject of efforts that are reasonable under
17 the circumstances to maintain its secrecy."³ Ira Leventhal testified that Verigy has a written policy
18 for handling confidential information.⁴ Having a written policy for handling confidential information
19 may be a reasonable measure to maintain confidentiality, depending on what it instructs employees to
20 do. The purpose of such a policy is to ensure that employees know what information is confidential
21 and how to handle that information.

22 Verigy easily could have provided the best available evidence that it has such a policy — a
23 copy of the policy itself. Instead, it elected to withhold the document from this court and to rely on
24

25
26 ¹ Leventhal Deposition 10/4/07 at 46:25 - 47:19 (relevant portions of Mr. Leventhal's deposition
27 transcript are attached as Exhibit A to the Declaration of Kathryn G. Spelman, filed and served
herewith).

28 ² *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

³ Cal. Civ. Code § 3426.1(d)(2)

⁴ Leventhal Deposition 10/4/07 at 48:25-49:4 (Exhibit A to Spelman Declaration).

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1 Mr. Leventhal's testimonial description. Under the "best evidence rule," the court should strike Mr.
 2 Leventhal's testimony about the document's contents and infer that Verigy has no such policy.

3 The best evidence principle requires a party to provide the best available evidence to support
 4 its argument. This common-law principle traces back to 18th century English law. In 1745, Lord
 5 Harwicke held that evidence was inadmissible unless it was "the best that the nature of the case will
 6 allow."⁵ A modern embodiment of this principle is in Federal Rule of Evidence 1002: "To prove the
 7 content of a writing, recording, or photograph, the original writing, recording, or photograph is
 8 required."

9 As Verigy's Senior Research and Development Manager, Mr. Leventhal oversees creation of
 10 Verigy confidential information and intellectual property.⁶ Although he attempts to testify, in his
 11 declaration, [REDACTED], Mr. Leventhal
 12 admitted in his deposition that [REDACTED]

13 [REDACTED]⁷

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18
 19 Testimony about the contents of a document is inadmissible if the party offering the testimony
 20 could have produced the document (or a copy) in court.⁹ The alleged policy in question is solely
 21 within Verigy's control. Verigy elected to cause the written policy to be absent from these
 22 proceedings.¹⁰ Mr. Leventhal's testimony about [REDACTED] adds nothing

23 ⁵ *Omychund v Barker*, 1 Atk 21, 49; 26 ER 15, 33 (1745)

24 ⁶ See Ira Leventhal's first Declaration at ¶ 2 and 6-7

25 ⁷ See Leventhal Deposition 10/4/07 at 47-54 (Exhibit A to Spelman Declaration)

26 ⁸ Leventhal Depo 10/4/07, 54:1-9 (Exhibit A to Spelman Declaration)

27 ⁹ *U.S. v. Bennett*, 363 F.3d 947, 953-54 (9th Cir. 2004); *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d
 28 662, 669 (7th Cir. 2003); *White Industries, Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1077-78
 (W.D. Mo. 1985); *R.R. Management Co. LLC v CFS La. Midstream Co.*, 428 F.3d 214 (5th Cir.
 2005)

¹⁰ *U.S. v. Bennett*, 363 F.3d at 953-54; see Leventhal Deposition 10/4/07 at 47-54 (Exhibit A to
 Spelman Declaration).

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1 to the policy itself — especially considering his admission that [REDACTED]

2 [REDACTED].¹¹ For example, he [REDACTED]

3 [REDACTED]¹²

4 Defendants further object to the contents of paragraph 4 because it constitutes opinion
5 testimony, does not satisfy the requirements of F.R.E. 701, and should be excluded.¹³

6 Defendants further object to the contents of paragraph 4 because it is speculative and should
7 be excluded pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice,
8 confusion or waste of time.)

9 Defendants will respectfully request the court at the hearing on the motion to sustain the
10 above objections and to strike the evidence referred to above.

OBJECTION NO. 3:

11 Defendants object to and move to strike the contents of Paragraph 2, beginning at page 1, line
12 14 and continuing through page 2, line 7, and beginning with:

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

Grounds for Objection:

18 Defendants object to the statement because it constitutes opinion testimony, does not satisfy
19 the requirements of F.R.E. 701, and should be excluded.¹⁴

20 Defendants further object to the statement because it is speculative and should be excluded
21 pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice, confusion or
22 waste of time.)
23
24
25
26

27 ¹¹ *U.S. v. Mayans*, 17 F.3d 1174, 1184–85 (9th Cir. 1994)

¹² Leventhal Deposition 10/4/07 at 49:2–4 (Exhibit A to Spelman Declaration).

¹³ *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

¹⁴ *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

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1 Declarations in support of a motion must be made by a witness having personal knowledge of
 2 the facts stated therein.¹⁵ It is insufficient for a witness simply to state that he or she has personal
 3 knowledge of the facts stated. Rather, the declaration itself must contain facts showing the
 4 declarant's connection with the matter stated therein, establishing the source of his or her
 5 information.¹⁶

6
 7 Defendants will respectfully request the court at the hearing on the motion to sustain the
 8 above objections and to strike the evidence referred to above.

OBJECTION NO. 4:

9
 10 Defendants object to and move to strike the statement contained in Paragraph 3, page 2, lines
 11 20 through 23, which states:

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]

Grounds for Objection:

15
 16 Defendants object to the statement because it constitutes opinion testimony, does not satisfy
 17 the requirements of F.R.E. 701, and should be excluded.¹⁷

18
 19 Defendants further object to the statement because it is speculative and should be excluded
 20 pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice, confusion or
 21 waste of time.)

22 Defendants will respectfully request the court at the hearing on the motion to sustain the
 23 above objections and to strike the evidence referred to above.

24
 25
 26 **B. Declaration of Wei Wei in Support of Plaintiff's Reply and Supplemental Brief
 Re Order to Show Cause re Preliminary Injunction**

27 ¹⁵ Federal Rules of Civil Procedure ("FRCP") Rule 56(e).

28 ¹⁶ F.R.E. 602; *see, United States v. Shumway*, 100 F.3d 1093, 1104 (9th Cir. 1999).

¹⁷ *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

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1 Plaintiff cites Wei Wei's declaration in support of its argument that "[REDACTED]"

2 [REDACTED]¹⁸ Mr. Wei's

3 declaration is replete with statements, conclusions and opinions regarding the marketing efforts and
4 intentions of both Verigy and STS. However, as stated in his declaration, Mr. Wei states that [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Mr. Wei is an engineer.¹⁹ [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 In his deposition, Mr. Wei confirmed that [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]²³ However, his declaration steps
15 beyond the scope of his expertise to opine about [REDACTED]

16 [REDACTED]
17 [REDACTED] Mr. Wei renders opinions and makes assumptions about
18 motivations of the designers during the definition phase of both Verigy's efforts²⁵ and STS.²⁶ Mr.
19 Wei stepped far beyond his expertise and rendered speculative and improper opinion testimony. As
20 stated at the deposition,
21

22
23 ¹⁸ Plaintiff's Reply and Suppl Brief, p.4.

24 ¹⁹ Wei's Decl. paragraph 1

25 ²⁰ Wei Decl. paragraph 5

26 ²¹ Wei Deposition 8:7-9 (relevant portions of Mr. Wei's deposition transcript are attached as Exhibit B to the Declaration of Kathryn G. Spelman, filed and served herewith).

27 ²² Wei Deposition 18:23-23:25 (Exhibit B to Spelman Declaration).

28 ²³ Wei Deposition 23:16-24 (Exhibit B to Spelman Declaration).

²⁴ Wei Deposition 71:20-74:2 (Exhibit B to Spelman Declaration).

²⁵ Wei Deposition 119:5-10; 129:21-130:1 (Exhibit B to Spelman Declaration).

²⁶ Wei Deposition 135:22-137:8 (Exhibit B to Spelman Declaration).

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1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]

6 Defendants object to the following specific portions of Mr. Wei's declaration:

OBJECTION NO. 1:

7
 8
 9
 10 Defendants object to and move to strike the statement contained in Paragraphs 27 through 33,
 11 beginning at page 12, line 2 and continuing through page 13, line 13. All paragraphs fall under the
 12 section entitled:

Grounds for Objection:

13 [REDACTED]
 14 [REDACTED]

15
 16 The statements contained in paragraphs 27 through 33 are largely recitations or
 17 characterizations of evidence for which Mr. Wei lacks any personal knowledge. For example, Mr.
 18 Wei states, "[REDACTED]"

19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]²⁸ Mr. Wei then proceeds to characterize alleged statements by Defendants to
 22 reach his conclusion that [REDACTED]

23 [REDACTED]
 24
 25 Mr. Wei has not established any foundation for this conclusion, opinion, or characterization.
 26 Mr. Wei's conclusions are speculative and should be excluded pursuant to F.R.E. 403 (exclusion of
 27 relevant evidence based on grounds of prejudice, confusion or waste of time.)

28 ²⁷ Wei Deposition 152:25-153:25 (Exhibit B to Spelman Declaration).

²⁸ Wei Decl. paragraph 27.

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1 Defendants further object to the statements because they constitute improper opinion
 2 testimony, and do not satisfy the requirements of F.R.E. 701. The statements, therefore, should be
 3 excluded.²⁹

4 There is no showing that Mr. Wei has personal knowledge of the alleged facts contained in his
 5 statements. Declarations in support of a motion must be made by a witness having personal
 6 knowledge of the facts stated therein.³⁰ The declaration itself must contain facts showing the
 7 declarant's connection with the matter stated therein, establishing the source of his or her
 8 information.³¹

9 Defendants will respectfully request the court at the hearing on the motion to sustain the
 10 above objections and to strike the evidence referred to above.

OBJECTION NO. 2:

11 Defendants object to and move to strike the statements contained in Paragraphs 41 through
 12 45, at page 15, lines 10 through 27. The above referenced paragraphs fall under the section untitled:

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

Grounds for Objection:

18 The statements contained in paragraphs 41 through 44 are recitations or characterizations of
 19 evidence for which Mr. Wei lacks any personal knowledge. Paragraph 45 contains the conclusion
 20 that [REDACTED]. Mr. Wei has not established any foundation
 21 for this conclusion, opinion, or characterization. Mr. Wei stepped far beyond his expertise and
 22 rendered speculative and improper opinion testimony. The conclusions are speculative and should be
 23 excluded pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice,
 24 confusion or waste of time.)
 25
 26

27 ²⁹ *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

28 ³⁰ FRCP Rule 56(e).

³¹ F.R.E. 602; *see, United States v. Shumway*, 100 F.3d 1093, 1104 (9th Cir. 1999).

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1 Defendants further object to the statements because they constitute improper opinion
 2 testimony, and do not satisfy the requirements of F.R.E. 701. The statements, therefore, should be
 3 excluded.³²

4 There is no showing that Mr. Wei has personal knowledge of the alleged facts contained in his
 5 statements. Declarations in support of a motion must be made by a witness having personal
 6 knowledge of the facts stated therein.³³ The declaration itself must contain facts showing the
 7 declarant's connection with the matter stated therein, establishing the source of his or her
 8 information.³⁴

9 Defendants will respectfully request the court at the hearing on the motion to sustain the
 10 above objections and to strike the evidence referred to above.

OBJECTION NO. 3:

11 Defendants object to and move to strike the statements contained in Paragraph 46, at page 16,
 12 lines 1 through 7. The above referenced paragraph falls under the section entitled:

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

Grounds for Objection:

18 The statements contained in paragraphs 46 is an improper and unfounded conclusion outside
 19 the scope of Mr. Wei's personal knowledge or expertise. The conclusion is speculative and should be
 20 excluded pursuant to F.R.E. 403 (exclusion of relevant evidence based on grounds of prejudice,
 21 confusion or waste of time.)
 22
 23
 24
 25
 26

27 ³² *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

28 ³³ FRCP 56(e).

³⁴ F.R.E.602; *see, United States v. Shumway*, 100 F.3d 1093, 1104 (9th Cir. 1999).

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Defendants further object to the statements because they constitute improper opinion testimony, and do not satisfy the requirements of F.R.E. 701. The statements, therefore, should be excluded.³⁵

There is no showing that Mr. Wei has personal knowledge of the alleged facts contained in his statements. Declarations in support of a motion must be made by a witness having personal knowledge of the facts stated therein.³⁶ The declaration itself must contain facts showing the declarant's connection with the matter stated therein, establishing the source of his or her information.³⁷

Defendants will respectfully request the court at the hearing on the motion to sustain the above objections and to strike the evidence referred to above.

OBJECTION NO. 4:

Defendants object to and move to strike the statements contained in Paragraphs 82 through 101, beginning at page 25, line 16 and continuing through page 32, line 4. All paragraphs fall under the section entitled:

[REDACTED]

Grounds for Objection:

The statements contained in paragraphs 82 through 101 are largely recitations or characterizations of various patents, leading to Mr. Wei's stated conclusion that "[REDACTED] [REDACTED]" Whether or not there is a publicly available solution that is the same as the [REDACTED] is the wrong test. It is not alleged that STS is providing the same solution as the [REDACTED]. The statements contained in paragraphs 82 through

³⁵ *Price v. Kumar*, 200 F.3d 1237, 1251 (9th Cir. 2000).

³⁶ FRCP 56(e).

³⁷ F.R.E. 602; *see, United States v. Shumway*, 100 F.3d 1093, 1104 (9th Cir. 1999).

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1 101 are not relevant evidence as defined by F.R.E. 401 and should be excluded pursuant to F.R.E.

2 403 (exclusion of relevant evidence based on grounds of prejudice, confusion or waste of time.)

3 There is no showing that Mr. Wei has personal knowledge of the alleged facts contained in his
4 statements. Declarations in support of a motion must be made by a witness having personal
5 knowledge of the facts stated therein.³⁸ The declaration itself must contain facts showing the
6 declarant's connection with the matter stated therein, establishing the source of his or her
7 information.³⁹

8
9 Defendants will respectfully request the court at the hearing on the motion to sustain the
10 above objections and to strike the evidence referred to above.

OBJECTION NO. 5:

11
12 Defendants object to and move to strike the statements contained Paragraph 3, entitled
13 "Executive Summary" which purports to be a summary of Mr. Wei's conclusions. Specifically, the
14 following
15

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24
25
26
27
28 ³⁸ FRCP Rule 56(e).

³⁹ F.R.E. 602; *see, United States v. Shumway*, 100 F.3d 1093, 1104 (9th Cir. 1999).

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Grounds for Objection:

The statements contained in paragraph 3, as referenced above are a summary of the conclusions reached later in Mr. Wei's Declaration. If the court sustains any of the above objections 1 through 5, then the corresponding statements contained in paragraph 3 of the Declaration should likewise be stricken on the same grounds.

Defendants will respectfully request the court at the hearing on the motion to sustain the above objections and to strike the evidence referred to above.

Dated: November 30, 2007

Mount & Stoelker, P.C.
Kathryn G. Spelman

/s/

Attorneys for Defendants Romi Mayder, Wesley Mayder,
Silicon Test Systems Inc., and Silicon Test Solutions LLC

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